MOTION FILED

JUN 4 1998

No. 97-1798

In the Supreme Court of the United States

OCTOBER TERM, 1997

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., ET AL., PETITIONERS

v.

ESQ BUSINESS SERVICES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE A BRIEF FOR AMICI CURIAE AND BRIEF FOR AMICI CURIAE AMERICAN CORPORATE COUNSEL ASSOCIATION, BANC ONE CORPORATION, CISCO SYSTEMS, INC., HEWLETT-PACKARD COMPANY, INTERNATIONAL PAPER COMPANY, AND PACIFIC TELESIS GROUP IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF FOR AMICI CURIAE AMERICAN CORPORATE COUNSEL ASSOCIATION, BANC ONE CORPORATION, CISCO SYSTEMS, INC., HEWLETT-PACKARD COMPANY, INTERNATIONAL PAPER COMPANY, AND PACIFIC TELESIS GROUP IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the American Corporate Counsel Association, BANC ONE CORPORATION, Cisco Systems, Inc., Hewlett-Packard Company, International Paper Company, and Pacific Telesis Group respectfully move for leave to file the attached brief as *amici curiae* in support of petitioners. Petitioners have consented to the filing of this brief, but respondent has withheld consent.

This case presents issues of critical importance both to corporations engaged in interstate commerce that receive legal advice and representation from out-of-state lawyers and to the attorneys (whether in-house or outside counsel) who provide such multi-state services. As major national corporations and the principal organization of in-house corporate counsel, *amici* have a direct and immediate interest in the outcome of the case in this Court.

The American Corporate Counsel Association is a non-profit national bar association for in-house corporate counsel. Since its founding in 1982, ACCA has grown to more than 10,400 members representing approximately 4,600 corporations and other private-sector organizations. In accordance with its longstanding and active role in issues concerning the legal profession and bar requirements, ACCA consistently has promoted standards that facilitate the effective and efficient practice of law and opposed standards that interfere with that objective, including state bar

requirements that discriminate against or burden the national provision of corporate legal services. This case thus is of central importance to ACCA and the clients its members represent. ACCA has participated as *amicus curiae* in a number of cases before this Court. See, *e.g.*, *Swidler & Berlin* v. *United States*, cert. granted, No. 97-1192 (U.S. Mar. 30, 1998); *Virginia Bankshares* v. *Sandberg*, cert. granted, 495 U.S. 903 (1990), rev'd, 501 U.S. 1083 (1991); *Frazier* v. *Heebe*, cert. granted, 479 U.S. 960 (1986), rev'd, 482 U.S. 641 (1987).

BANC ONE CORPORATION, Cisco Systems, Inc., Hewlett-Packard Company, International Paper Company, and Pacific Telesis Group are major national corporations that are engaged in interstate (and international) commerce. In addition, many of their in-house lawyers are members of ACCA. Officers and employees of these companies routinely receive legal advice and representation in California and elsewhere from both inside and outside counsel located in other states. These *amici* therefore are significantly affected by the issue in this case.

Amici believe that their national perspective and extensive practical experience, as reflected in the arguments below, will be of considerable assistance to the Court in its resolution of the important questions presented in the petition. Accordingly, *amici* request that their motion for leave to file a brief in support of petitioners be granted.

Respectfully submitted.

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JUNE 1998

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INTEREST OF THE AMICI CURIAE

The interest of the *amici curiae* is set forth in the accompanying motion for leave to file this brief. Petitioners have consented to the filing of this brief, but respondent has withheld consent.[1]

ARGUMENT

I. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW.

This case presents a question of critical significance both to corporations engaged in interstate commerce that receive legal advice and representation in California and elsewhere from out-of-state lawyers and to the attorneys (whether in-house or outside counsel) who provide such services. The decision of the California Supreme Court construing the state's "unauthorized practice of law" (UPL) statute flies in the face of modern commercial realities for interstate clients and their lawyers. The decision below, if left unreviewed, will have radical and detrimental consequences for the provi-

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[1] Pursuant to S. Ct. R. 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

sion of legal services in this country. Moreover, the California UPL rule constitutes a core violation of the Commerce Clause. Because the issue presented is of fundamental importance and affects the rendition of legal services on a daily basis, and because of the gravity of the Commerce Clause violation, this Court's intervention is called for.[2]

The California UPL rule restricts the provision of legal services in California to members of the California bar. Accordingly, under the decision below, out-of-state practitioners are excluded from advising or representing interstate clients in California in all non-litigation contexts. As this brief demonstrates, such a parochial and protectionist rule violates both of the established standards of the Commerce Clause: it *discriminates* against interstate commerce by favoring California lawyers over their out-of-state competitors in the market for non-litigation services in California, and it *burdens* interstate commerce by making it more expensive and difficult for interstate clients to obtain such legal advice or representation from counsel of their choice. The California UPL rule – which is broadly applicable to all legal counseling, transactional work, and alternative-dispute-resolution procedures in California – thus disqualifies out-of-state counsel who otherwise would be selected by the client and requires the participation of California lawyers who otherwise would be unnecessary. As a result, the rule impairs the provision of the most effective, efficient, and economical legal services by attorneys involved in the interstate practice of law to clients engaged in interstate commerce.

The California Supreme Court's decision ignores the modern interstate practice of law and its essential role in providing legal advice and representation to interstate clients.

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[2] As petitioners demonstrate (Pet. 29-30), the case also raises a substantial question of preemption under the Federal Arbitration Act.

Although it gave lip service to "the interstate nature of modern law practice" (70 Cal. Rptr. 2d at 306), the court's analysis took *no* account of and accorded *no* weight to that consideration. It is a truism that the provision of legal services to clients today is largely and increasingly interstate and even international in character. This reflects a number of developments, including the nationalization and globalization of business, advancements in transportation and communications, greater use of computers and the growing legal and economic importance of "cyberspace," the trend toward specialization of practitioners, and the emergence of consistent legal standards under federal law and uniform state laws. See Pet. 17-22. The California Supreme Court simply disregarded these factors, preferring the state's own interest to that of interstate commerce. As *amici* show below, this intolerably discriminates against and burdens interstate commerce.

The California Supreme Court's decision is of unquestionable public importance. It has been the subject of much – and much critical – commentary.[3] For example, Pro-

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[3] See, *e.g.*, Molly McDonough, *Chicago Bar Association Joins Fray over California Opinion Slamming Door on Out-of-State Lawyers*, CHIC. DAILY L. BULL. 1 (May 14, 1998); Debra Baker, *Lawyer, Go Home: Firms Negotiating Multistate Deals Should Take Heed of California Decision on Unauthorized Practice*, 84 A.B.A.J. 22 (May 1998); Sylvia Stevens, *Bar Counsel: A Cautionary Note*, 58 OR. ST. BAR BULL. 29 (Apr. 1998); Gregory R. Smith, *Out of Practice – Protecting Only California Lawyers Is a Shaky Way to Guard Clients' Rights*, LOS ANGELES DAILY J. 6 (Jan. 27, 1998); Arthur S. Hayes, *License Is Required; No Trespassing*, NATIONAL L. J. A4 (Jan. 19, 1998); Martin Kassman, *Court Puts Limits on Out-of-State Firms*, THE RECORDER 3 (Jan. 6, 1998); *California Supreme Court Denies Unlicensed New York Firm Fees for California Service*, 7 PROFESSIONAL LIAB. LIT. REP. No. 6 at 3 (Andrews Publications, Feb. 1998); *California Supreme Court Bars Fee Payments for New York Firm's Failure to Get State Licensing*, 1 MEALEY'S LIT. REP.: ATTORNEY FEES No. 6 at 1 (Mealey Publications, Jan. 1998); *Today's News*, NEW YORK L. J. 1 (Jan. 7, 1998).

fessor Charles W. Wolfram of Cornell Law School, a leading scholar on the legal profession, has characterized the decision below as "appalling. * * * It is a cloud over interstate law practice."[4] In his view, it "sets the legal field back a quarter of a century at least. * * * [It is] draconian * * * [and] insane."[5] Accordingly, Professor Wolfram urges this Court to grant review because "[t]he opinion is so bad * * * [that the Court] can't let this stand in a modern nation."[6]

Other commentators have expressed similar views. Notably, the Assistant General Counsel of the Oregon State Bar has expressly disagreed with the decision below:

> I am not persuaded that the protection of California citizens from incompetent practitioners justifies the broad rule enunciated in *Birbrower*. I also detect signs of protectionism that are disheartening. The opinion seems to move the profession several steps backwards in our efforts to bring the regulation of lawyers into harmony with modern legal and business practice. I hope it is an anomaly and not the beginning of a trend.[7]

Finally, and of great significance, the American Law Institute on May 12, 1998, approved the RESTATEMENT OF THE LAW GOVERNING LAWYERS. Section 3 of the Restatement rejects the California Supreme Court's rule as a matter of black-letter law, and the Reporter pointedly calls the deci-

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4 See CHIC. DAILY L. BULL. at 22.

5 See 84 A.B.A.J. at 22-23.

6 See CHIC. DAILY L. BULL. at 22.

7 See 58 OR. ST. BAR BULL. at 32.

sion below "unduly restrictive."[8] Furthermore, the comment to the Restatement recognizes, contrary to the decision below, that "the need to provide effective and efficient legal services to persons and businesses with interstate legal concerns requires that jurisdictions not erect unnecessary barriers to interstate law practice."[9]

A decision of California's highest court that has been so roundly criticized by respected authorities, and that has such widespread and deleterious consequences for interstate commerce and the legal profession, plainly warrants this Court's review.

II. BY DISCRIMINATING AGAINST AND BURDENING INTERSTATE COMMERCE, THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF THE STATE'S "UNAUTHORIZED PRACTICE OF LAW" STATUTE VIOLATES THE COMMERCE CLAUSE.

A. The California UPL Rule Violates The Commerce Clause By Discriminating Against Out-Of-State Lawyers Engaged In The Interstate Practice Of Law.

1. The Commerce Clause prohibits state discrimination against interstate commerce.

As this Court has repeatedly held and recently reaffirmed, "it is well established that the [Commerce] Clause * * * embodies a negative command forbidding the States to discriminate against interstate trade." *Associated Industries* v. *Lohman*, 511 U.S. 641, 646 (1994). Grounded in the core

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[8] See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 3, reporter's note to cmt. e at 33 (Proposed Final Draft No. 2, Apr. 6, 1998).

[9] See *id.*, cmt. a at 23.

purpose of the Commerce Clause, this fundamental principle "prohibits economic protectionism – that is, 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* at 647. Thus, "[a] cardinal rule of Commerce Clause jurisprudence" proscribes state regulation that "'discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 (1984). "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 390 (1994). In this way, the Constitution avoids "'economic Balkanization.'" *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. ___, 117 S. Ct. 1590, 1599 (1997).

Discriminatory state regulation is subject to a "virtually *per se* rule of invalidity * * * [and] 'facial discrimination by itself may be a fatal defect.'" *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality*, 511 U.S. 93, 100-101 (1994). See also, *e.g.*, *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 331-332 (1996); *Associated Industries*, 511 U.S. at 647; *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 891 (1988) ("discrimination * * * renders the regulation invalid without more"). Under this standard, the Court has "routinely struck down" discriminatory state statutes. *New Energy Co.* v. *Limbach*, 486 U.S. 269, 274 (1988).

State regulation can be held to be discriminatory "on the basis of either discriminatory purpose * * * or discriminatory effect." *Bacchus Imports*, 468 U.S. at 270. Accordingly, "a court need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce." *Associated Industries*, 511 U.S. at 653. Rather, if the state regulation "in its

practical operation work[s] discrimination against interstate commerce" (*Best & Co.* v. *Maxwell,* 311 U.S. 454, 456 (1940)) and thus has the "inevitable effect" of discrimination (*American Trucking Associations* v. *Scheiner,* 483 U.S. 266, 284 (1987)), the Commerce Clause is violated.

This bedrock Commerce Clause principle is well illustrated by a line of cases in which this Court has invalidated state provisions designed to require that specified work be performed by in-state businesses. For example, in *C&A Carbone,* a municipality required that all solid waste generated within the town be processed by a designated local entity, thereby excluding out-of-state waste disposal companies; concluding that "[t]he ordinance thus deprives out-of-state businesses of access to a local market" (511 U.S. at 389), the Court held the provision impermissibly "discriminates" (*id.* at 390) because it "bar[s]" the out-of-state firms and "hoard[s] * * * [the work] for the benefit of local businesses." *Id.* at 392. Similarly, in *South-Central Timber Development, Inc.* v. *Wunnicke,* 467 U.S. 82 (1984), the Court struck down a requirement for in-state processing of timber, explaining that it "'viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could be more efficiently performed elsewhere'" and that "the Commerce Clause forbids a State to require work to be done within the State for the purpose of promoting employment." *Id.* at 100 (plurality opinion). And in cases such as *American Trucking Associations* and *Best & Co.,* the Court declared unconstitutional state taxing statutes that favored in-state entities over their out-of-state competitors on the ground that the Commerce Clause requires that states treat "state boundaries as a neutral factor in economic decisionmaking." 483 U.S. at 283.

2. The California UPL rule discriminates against the interstate provision of legal services.

Under the foregoing principles, the California UPL statute, as construed by the California Supreme Court, violates the Commerce Clause. In its practical and inevitable effect, the California UPL rule discriminates against the interstate provision of legal services to clients in California by requiring out-of-state practitioners (whether in-house or outside counsel) to join the California bar in addition to their home-state bar. Such discrimination substantially excludes out-of-state lawyers from advising or representing California clients and thus constitutes a classic case of prohibited economic protectionism.

a. To begin with, there can be no doubt that the provision of legal services to California clients by out-of-state lawyers involves interstate commerce. See, *e.g.*, *Hishon* v. *King & Spalding*, 467 U.S. 69, 73-74 (1984). Although "the practice of law [i]s a profession," it also has a "business aspect." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 (1975). See also *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 281 (1985), quoting *Goldfarb*, 421 U.S. at 788 ("the practice of law is important to the national economy," and "the 'activities of lawyers play an important part in commercial intercourse'"); *Camps Newfound/Owatonna*, 520 U.S. at ___, 117 S. Ct. at 1599 n.10 ("[w]e have long noted the applicability of our dormant Commerce Clause jurisprudence to service industries").

b. There also can be no doubt that the California UPL rule discriminates against the interstate provision of legal services. It manifestly tends to favor in-state lawyers over their out-of-state competitors, thereby artificially preserving the market for the benefit of local attorneys. Indeed, as this Court has observed:

> A former president of the American Bar Association has suggested * * * [that] "[m]any of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition."

Piper, 470 U.S. at 285 n.18, quoting Chesterfield Smith, *Time For a National Practice of Law Act,* 64 A.B.A.J. 557 (Apr. 1978). See also 470 U.S. at 285 n.18 (characterizing such a reason as "economic protectionism" and "not 'substantial'"); *Barnard* v. *Thorstenn*, 489 U.S. 546 (1989) (restriction on admission to bar for out-of-state attorneys violates the Privileges and Immunities Clause); *Supreme Court of Virginia* v. *Friedman*, 487 U.S. 59 (1988) (same); *Piper, supra* (same).

For in-house or outside counsel located in another state to advise or represent a client in California, they must become a member of the California bar or risk committing a criminal misdemeanor. Absent California bar membership, the UPL prohibitions would prevent them from advising or representing clients in California regardless of their professional competence or indeed their special qualifications to assist the client, such as their recognized expertise and national reputation in the substantive area of law, their longstanding relationship with and knowledge of the client and its industry, and their involvement in related aspects of the representation in states other than California. In many instances, the UPL rule will require them to study for and pass the California bar exam even though they are experienced attorneys licensed and qualified to practice law in their home state; at the least they will have to incur significant costs to join the California bar and comply with the ongoing requirements of California bar membership – all in addition to the costs and requirements of their home-state bar. See *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 348-349, 350-351 (1977) (state regulation that increases costs of doing business for

out-of-state competitors constitutes discrimination). Moreover, during the often lengthy period prior to their admission to the California bar, these attorneys would be excluded from practicing law in California under the UPL rule.

This categorical discrimination against the interstate practice of law imposed by the California UPL rule is exacerbated by the breadth of the rule and the importance of the California legal market. The decision below extends to all types of legal services other than judicial litigation. It thus applies, as in this case, to arbitration as well as other forms of alternative dispute resolution such as mediation. Likewise, it reaches all kinds of transactional work and legal counseling, including acquisitions, mergers, and sales of multi-state businesses, nationwide licensing agreements, and nationally standardized consumer contracts. Given that California is the country's most populous state and its role as a national (and international) center of commerce, the discrimination against interstate legal practice inherent in the California UPL rule is especially egregious.

In sum, the California UPL rule is discriminatory protectionism pure and simple. In cases like *C&A Carbone* and *South-Central Timber,* the Commerce Clause did not allow a state to discriminate against out-of-state competitors in order to protect in-state businesses. Similarly, in *American Trucking Associations,* the Commerce Clause condemned a discriminatory Pennsylvania highway tax that benefited in-state truckers and disadvantaged their out-of-state competitors that engaged in interstate trucking services. The California UPL rule suffers from the same constitutional infirmity.

c. As discriminatory and protectionist state regulation, the California UPL rule is, *amici* submit, "invalid without more." *Bendix Autolite,* 486 U.S. at 891. But "[a]t a minimum such facial discrimination invokes the strictest scrutiny

of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979). Under this standard, discrimination is "*per se* invalid, save in a narrow class of cases in which the [state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C&A Carbone*, 511 U.S. at 392; see also *Hughes*, 441 U.S. at 336 ("'[t]he burden falls on the State to justify * * * [discrimination] in terms of * * * the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake'").

Here, there are no conceivable justifications for the sweeping and categorical exclusion of lawyers licensed in other states from advising or representing clients in California. Although *amici* recognize, of course, the legitimate interest of states in prohibiting incompetent or unethical lawyering, that interest can be adequately served in other, nondiscriminatory ways. Because the state's interest does not require that out-of-state lawyers must join the California bar in order to provide competent and ethical legal services to California clients, the California UPL rule is fatally overbroad and constitutionally unjustified.

To begin with, California can – as in fact it already does – require out-of-state lawyers engaging in legal services in the state to comply with California standards of professional conduct. The Rules of Professional Conduct of the State Bar of California set forth the governing standards. By the terms of Rule 1-100(B)(3), these standards are applicable to a "[l]awyer" who is "a member of the Bar of California *or a person who is admitted in good standing of and eligible to practice before the bar of * * * the highest court of * * * any state*" (emphasis added). As Rule 1-100(D)(2) then expressly provides:

> As to lawyers from other jurisdictions who are not members [of the California bar,] * * * [t]hese rules shall * * * govern the activities of lawyers while *engaged in the performance of lawyer functions in this state* * * *. (Emphasis added.)

These Rules thus serve "to protect the public and promote respect and confidence in the legal profession" (Rule 1-100(A)) with respect to both California-admitted and non-California-admitted attorneys.

California also has available means to deter and sanction incompetent or unethical conduct by out-of-state lawyers. For example, under the decision below, the UPL statute makes it a misdemeanor for a lawyer not admitted to the California bar to practice law in California. In terms of the state's authority, California equally could make it a misdemeanor for a lawyer not admitted to the California bar to engage (with the requisite *mens rea*) in the incompetent or unethical practice of law in California. This criminal sanction substantially serves California's interest without requiring all lawyers advising or representing clients in the state to become members of the state bar.

By the same token, California has the authority to impose other sanctions to promote its interest. It could, for instance, levy monetary penalties for the improper practice of law, and might also be able to order forfeiture of the fees in question. In addition, the state could, as it does now, provide to aggrieved clients a private civil remedy (effectuated through long-arm jurisdiction) for malpractice.

So, too, California could censure incompetent or unethical lawyers and prohibit them from practicing law in the state in the future. Although presumably only the lawyer's home-state bar, and not California, can disbar an unprofessional attorney, California's action censuring an attorney and

precluding his future practice in the state surely would have grave consequences before the lawyer's home-state bar.

Finally, in assessing the adequacy of these non-discriminatory alternatives, three additional considerations are significant. *First,* the California UPL rule excludes attorneys who are members of the bar of other states and who often have extensive experience in the practice of law, in the given legal area and type of transaction or ADR procedure involved, and in advising or representing the particular client. What is more, both substantive and procedural requirements are increasingly consistent across the country as a matter of either federal law or uniform state law such as the Uniform Commercial Code. While California is not bound by the standards of other states, neither can it turn a blind eye to these factors, as the court below did, in determining whether California's discriminatory UPL rule is necessary to further the state's interest.

Second, at least in the common context of corporate clients, the California UPL rule is not needed to protect against incompetent or unethical lawyers. Corporations are relatively sophisticated purchasers of legal services, and that is especially likely to be true in cases involving the interstate provision of legal services. With respect to in-house counsel, such attorneys provide legal services only to their company and thus pose no issue of advising "the unprotected public." *In re Application of R.G.S.*, 541 A.2d 977, 984 (Md. 1988). See RESTATEMENT OF THE LAW GOVERNING LAWYERS cmt. f at 30 & reporter's note to cmt. f at 34; *Unauthorized Practice Opinion*, 98 N.J.L.J. INDEX 399 (May 1, 1975) ("[t]he corporate employer, who is aware of the qualifications and compentency of his attorney-employee, does not require the same protection as the general public"). Moreover, with respect to outside counsel, in-house lawyers for interstate corporations are integrally involved in selecting, working with, and monitoring the performance of outside attorneys.

In addition, because these relations tend to continue over a period of time and a number of matters, the corporate client has a continuing opportunity to oversee counsel and a continuing means both to ensure the adequacy of his services and to pursue and rectify any grievances.

Third, there is no demonstrated basis for California's discriminatory UPL rule that could satisfy the state's burden of justification. This omission is especially telling because, until the California Supreme Court's decision in this case, corporate practitioners widely assumed that the conduct here at issue did not constitute the unauthorized practice of law in California. Despite this prevailing practice, however, the state has not pointed to any widespread abuses or other practical problems that could possibly justify the challenged discrimination against interstate commerce.

For these reasons, California has non-discriminatory alternatives available that sufficiently further its interest in the competent and ethical practice of law in the state. That is particularly so in the case of interstate corporate clients with offices in California, which is the most typical situation involving the provision of legal services by out-of-state counsel. Accordingly, California' discriminatory UPL rule cannot stand under the Commerce Clause.

B. The California UPL Rule Violates The Commerce Clause By Burdening The Interstate Client's Choice Of Out-Of-State Counsel To Advise Or Represent It In California.

1. The Commerce Clause prohibits state burdens on interstate commerce.

In addition to prohibiting state discrimination against interstate commerce, the Commerce Clause also forbids states from burdening interstate commerce. Even "[w]here the statute regulates evenhandedly to effectuate a legitimate

local public interest, and its effects on interstate commerce are only incidental," state regulation will be invalidated if "the burden imposed is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church,* 397 U.S. 137, 142 (1970). Under this standard, "[w]here the burden of a state regulation falls on interstate commerce, * * * [courts] weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed is an unreasonable one." *Bendix Autolite,* 486 U.S. at. 891.

In undertaking this assessment, the Court first considers the significance of the burden on interstate commerce. See *Pike,* 397 U.S. at 142. In particular, in weighing the burden on commerce, it considers the cumulative effect that would result if the challenged regulation was adopted by each of the 50 states. See *American Trucking Associations,* 483 U.S. at 284. Second, the Court considers the availability of less burdensome alternatives to promote the state's legitimate interests. See *Pike,* 397 U.S. at 142. A state regulation violates the Commerce Clause if it substantially burdens interstate commerce and its purposes could be furthered through less burdensome means.

2. The California UPL rule burdens the interstate client's use of out-of-state counsel.

Here, California's UPL rule imposes substantial burdens on interstate commerce. Most significantly, it burdens the interstate companies that are the clients seeking advice or representation in California from out-of-state attorneys (whether in-house or outside counsel). By making the provision of such services more expensive and less efficient, California impairs the operations of these interstate clients and interferes with their free and informed choice of counsel. This restraint on commerce becomes even clearer by considering the onerous and Balkanizing effect that would result if every state adopted the California rule. Because it substan-

tially burdens interstate commerce, and because there are less burdensome alternatives to further the state's legitimate interest, the California UPL rule violates the Commerce Clause.

a. The circumstances in which the California UPL rule burdens interstate commerce are legion and arise on a regular basis in corporate law departments around the country. The following illustrations tellingly demonstrate the constitutional vice in the California rule.

For example, an interstate corporation may have a number of valid and important reasons for seeking advice or representation in California from an outside attorney who is not a member of the California bar. The attorney may be a recognized national expert in the substantive area of law or type of transaction involved. Likewise, the attorney may have a longstanding relationship with the client that both gives him important information about the company's operations and interests and leads the client to repose a high degree of trust and confidence in his abilities and judgment.

For the same reasons, a corporate client may wish to obtain advice or representation in California from in-house counsel who are not admitted in California. In-house counsel often are the company's experts in a particular area and have responsibility for the issue in other states around the country, and therefore it is appropriate for them to handle such matters in California as well. Similarly, in-house counsel have unique familiarity with and knowledge of the company's organization and objectives that are crucial to advising or representing the client. And in-house counsel frequently handle matters, such as some contract issues or arbitrations, that would not justify the involvement of another lawyer.

In some situations, it is the nature of the matter that causes an interstate corporation to select an out-of-state law-

yer to advise or represent it in California. For instance, a major merger, or large commercial transaction, or standardized form of contract may touch a number (or even all) of the 50 states, and the client understandably wants lead counsel to handle the matter everywhere. Equally, a matter may predominantly raise questions of federal law and only incidentally of state law, and again the company may select a lead attorney with federal expertise to counsel it on related state-law issues.

In fact, in many situations, it is entirely coincidental that a matter arises in California at all. Arbitration under a multi-state contract, for example, might be brought in any of a number of states; and arbitration of a tort or insurance claim could come up wherever a loss has occurred. Likewise, an issue may subsequently arise in California that is related to an already pending matter being handled in another state by a lawyer who is not admitted in California.

In these and countless other situations, the California UPL rule prevents the interstate corporation from utilizing the attorney that can best and most efficiently represent its interests in California. Of course, if the client believes that the involvement of a California attorney is indicated, it can and will retain such counsel. But often it is not necessary or economical to engage an additional attorney. Furthermore, a local attorney may not be needed in many areas where California law follows federal law or is based on a model code or uniform state law such as the Uniform Commercial Code.

In the face of the California UPL rule, interstate corporations confront a number of burdensome and undesirable alternatives. In an extreme case, the company might decide not to have an office in California in order to avoid this problem. Such a result is a clear violation of the Commerce Clause's purpose of an integrated and unfettered national economy.

Alternatively, the company could require that all of its attorneys (both in-house and outside) be admitted to the California bar as well as their home-state bar. However, such multiple bar memberships simply increase the cost of legal services. Moreover, this course would not be feasible, and could cause critical delays or substitutions of counsel, for attorneys who do not regularly provide advice or representation in California and unexpectedly find themselves involved in an issue that arises in California as part of a broader and ongoing matter. What is more, these problems are geometrically compounded if all of the attorneys used by the company have to be members of the bar of each of the 50 states (assuming that could be done at all).

The company could attempt to circumvent those difficulties by using a sufficiently large number of lawyers to make sure that at least one is admitted in every state. But that approach deprives it of the efficiency, expertise, and continuity of using the same lawyer to handle similar issues around the country. The impracticality of this approach is especially evident for in-house legal departments, which frequently are not big enough to ensure that all 50 states are covered.[10] In the end, most companies do not need 50 lawyers (or one lawyer admitted in 50 states, or any combination in between) to advise or represent it in many areas such as antitrust law or the U.C.C.

Finally, the interstate corporation could seek to bring in a California lawyer to. work with its out-of-state counsel. Under the California Supreme Court's decision, however, it is

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[10] According to internal statistics, 60% of ACCA's members practice in in-house law departments of five or fewer attorneys, and another 25% are in law departments of between 6-20 attorneys. A group of 35 in-house attorneys would be among the 200 largest corporate law departments in the country. *200 Largest Law Departments*, 7 CORP. LEGAL TIMES No. 69 at 1 (Aug. 1997).

far from clear that this would satisfy the statute. See 70 Cal. Rptr. 2d at 307 n.3 ("[c]ontrary to the trial court's implied assumption, no statutory exception to [the UPL rule] allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar"). In any event, that alternative also burdens interstate commerce. At a minimum, the mandatory retention of California counsel will inflate the cost of legal services. Indeed, not only will two lawyers have to be retained and paid on the matter, but the need for continuing consultation and coordination between them will further increase the legal bill and give rise to complications and delay. See RESTATEMENT OF THE LAW GOVERNING LAWYERS cmt. e at 27.

In short, the California UPL rule unquestionably interjects significant additional costs and inefficiencies into the provision of legal services in California to interstate corporations. In so doing, it plainly imposes a substantial burden on interstate commerce.

b. As explained above, less burdensome alternatives to the California UPL rule are available to further the state's interest in the provision of competent and ethical legal services. See pages 10-14, *supra*. Accordingly, the California UPL rule violates the Commerce Clause as a burden on interstate corporations' choice of out-of-state counsel to provide effective and efficient advice or representation in California.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1998